In the Supreme Court
OF THE
United States

OCTOBER TERM, 1941

No.

ROBERT MOODY, AUGUST J. LANG, JR., and R. F. MCMULLEN,
Petitioners,

vs.

TOOLE COUNTY IRRIGATION DISTRICT,
Respondent.

BRIEF IN SUPPORT OF PETITION.

INTRODUCTION.

The statutory provisions sustaining jurisdiction, and the jurisdictional facts, are set out in the Petition.

The judgment of the Court below appears in the record, pages 120-128, and is reported in 125 F. (2d) 498.

I.

THE FEDERAL COURTS SHOULD NOT CONNIVE AT REPUDIATION BY THE STATES OF THEIR OBLIGATIONS.

In Part II we attempt to show that breach of faith, whether public or private, is not in the public interest; and should not be aided by the Courts except when other factors are present which justify it.

(a) A judicial decision may impair the obligation of contracts just as a statute may.

A decision of a state Court which, by construing a statute, destroys or impairs contract rights previously acquired, has the undeniable effect of impairing the obligation of the contract in fact, whether or not it falls within the tenth section of Article I of the Constitution.

Otherwise stated, the Constitution provides that "no State shall * * * pass any * * * law impairing the obligation of contracts * * *". There is, of course, much authority for the proposition that a state Court decision does not fall within the scope of this prohibition:

Tidal Oil Co. v. Flanagan, 263 U. S. 444, 451.

This result was doubtless inevitable so long as the Courts accepted the proposition that a Court cannot make, but merely declares, the law.

It is nevertheless plain that a state Court has the physical power to impair the obligation of a contract (by construing a statute unreasonably, or by changing its construction), precisely as the legislature has the power to impair it by amending the statute. The

decisions which most obviously do so are decisions which, as in the present case, overrule earlier decisions which were in entire accord with the words of the statute, and with the decisions in other states interpreting similar statutes. The decision of the Court below in the *Judith Basin* case, concerning the precise question here presented, is a perfect illustration.

In short, the answer to the question whether or not a state Court's decision falls within the prohibition of Section 10 of Article I of the Constitution turns on the answer to the question whether, when a state Court decides a case, it can be said to "pass a law". But the question whether or not the decision impairs the obligation of a contract, depends on the factual relation between the contract and the decision.

(b) The rule of the Erie case does not require that state decisions which destroy contract rights must be administered and applied with like effect by the federal Courts.

Swift v. Tyson, 16 Pet. 1, 18,

established the proposition that on questions governed by a state statute, the federal Courts must accept, not only the statute, but also "the construction thereof adopted by the local tribunals".

It has nevertheless been well settled in the past, that although the federal Courts are bound by the state Court's construction of state laws, they are not bound to give retroactive effect to such decisions. And when such a decision destroys or impairs the obligation of a contract, the federal Courts should not.

and have not in the past, given it retroactive effect. As was said by Mr. Chief Justice Taney in the very early case of

Rowan v. Runnels, 5 How. 134, 139,

> "Undoubtedly this court will always feel itself bound to respect the decisions of the State courts, and from the time they are made will regard them as conclusive in all cases upon the construction of their own constitution and laws.
>
> "But we ought not to give to them a retroactive effect, and allow them to render invalid contracts * * * which in the judgment of this court were lawfully made."

The rule has two aspects:

1. It applies where contract rights accrue under a statute prior to any interpretation thereof by the state Courts;

2. It applies where, after one interpretation of the statute, contract rights accrue, followed by a change in interpretation which destroys or impairs the contract rights in question.

As was said in

Anderson v. Santa Anna, 116 U. S. 356, 362:

> "* * * when contracts and transactions have been entered into, and rights have accrued thereon, under a particular state of the decisions, or where there has been no decision of the State tribunals, the Federal courts properly claim the right to adopt their own interpretation of the law applicable to the case, although a different interpretation may be adopted by the State courts after such rights have accrued."

A host of cases in which this doctrine has been applied are collected in 97 A. L. R. 515, following a reprint of the opinion in *Judith Basin Irrigation Dist. v. Malott,* 73 F. (2d) 142.

It is important to observe that the "general law" doctrine of *Swift v. Tyson* was not the foundation for the refusal of the federal Courts to follow state Court decisions, either in the situation typified by *Gelpcke v. Dubuque* or in that typified by the *Judith Basin* case, 73 F. (2d) 142.

On the contrary, these cases rest on considerations which were not present, either in *Swift v. Tyson* or in the *Erie* case.

Thus in *Gelpcke v. Dubuque,* 1 Wall. 175, the Court said, quoting from *Ohio Life and Trust Co. v. Debolt,* 16 How. 432,

> "The sound and true rule is, that if the contract, when made, was valid by the laws of the State as then expounded by all departments of the government, and administered in its courts of justice, its validity and obligation cannot be impaired by any subsequent action of legislation, or decision of its courts altering the construction of the law." (1 Wall. 175, 206.)

The doctrine of the *Gelpcke* case was, of course, reiterated and applied in scores of cases. They are collected in 97 A. L. R. at pages 516-522.

II.

REPUDIATION OF DEBTS IS NOT, AS SUCH, IN THE PUBLIC INTEREST.

The existence of bankruptcy laws, and the fact that apart from those laws, conditions may arise in which the public interest requires that outstanding debts, or some of them, be reduced or extinguished, should not lead to the conclusion that repudiation of debts is, as such, in the public interest.

On the contrary, it is surely better for the general understanding to be that promises openly and fairly made must be lived up to.

A merely casual reading of the opinion of the Court below in

Judith Basin Irrigation District v. Malott, 73 F. (2d) 142,

will show that the earlier Montana decisions were correct, and indeed inevitable, in view of the language and history of the statute in question. As the Court said in the *Judith Basin* case (p. 145),

> "The law of Montana authorizing the formation of irrigation districts, like that of many western states, is patterned after the Wright Act of California (St. Cal. 1887, p. 29). *Tomich v. Union Trust Co.,* 31 F. (2d) 515. As stated by the Supreme Court of Montana in *Re Crow Creek Irrigation District,* 63 Mont. 293, 207 Pac. 121, 122: 'In its general legislative plan, our statute is modeled after the Wright Law of California (*O'Neill v. Yellowstone Irr. Dist.,* 44 Mont. 492, 121 Pac. 283). * * *'
>
> "It has been uniformly held that the bonds of an irrigation district issued in pursuance of the

> Wright Act (St. Cal. 1887, p. 29, as amended) are general obligations of the district and this has been true in states where the state legislation has varied slightly from the provisions of the Wright Act but has been based upon it."

See also:

> *Fallbrook Irr. Dist. v. Bradley,* 164 U. S. 112;
> *Marlin v. Lewallen,* 276 U. S. 58, 62-63.

The same opinion shows that the later Montana decisions, wherein the opposite conclusion was reached, cannot be defended.

Hillhouse in his "Municipal Bonds", page 291, says:

> "Indeed, it has been said that the confidence manifested toward municipal bonds as 'securities' has been largely due to the attitude of the lower federal courts, and finally of the United States Supreme Court."

Judge John F. Dillon, when commenting upon this subject in 1876 said (Dillon, p. 443):

> "The Supreme Court of the United States has upheld the rights of the holders of municipal securities with a strong hand, and has set a face of flint against repudiation even when made on legal grounds termed solid by the State courts, by municipalities which had been deceived and defrauded. That such securities have any general value left is largely due to the course of adjudication in respect thereto by the Supreme Court. * * *"

In an elaborate note to the case of *Snare & Triest Co. v. Friedman,* 169 Fed. 1, in L.R.A. 40 N.S. 1912,

p. 367 at 407, it is stated that the federal Court nearly always follows the decisions of the highest Court of the state when the decisions sustain the validity of the bonds, but when the latest decisions on a statute would render the bonds invalid, the federal Court, unless as an independent proposition, it would reach the same conclusion, "generally finds some way of upholding the bonds notwithstanding the state Court decisions" and the note points out that "The precise ground of exception to the general rule, is apt to be dictated by the exigencies of the particular case". (p. 408.) Numerous decisions are collected in this note.

A course of state Court decisions may become a rule of property. See *Folsom v. Township 96,* 159 U. S. 611. The true rule may be that property rights cannot be taken away by state Court decision.

Many decisions show that the Supreme Court has not in the past found it difficult to find a basis for decision unfavorable to repudiation. It is a practical question.

III.

THE ERIE CASE LEAVES SEVERAL COURSES OPEN IN CASES LIKE THE PRESENT ONE.

In view of all the foregoing, it is, we submit, apparent that several possible solutions of controversies like the present one are at least logically possible:

(1) The federal Courts may hold that the *Erie* case leaves the rules announced in the *Gelpcke* case and the *Judith Basin* case unimpaired.

Plainly, the grounds upon which the rules in these cases rest are adequate to justify the conclusion that though the federal Courts are bound by state Court decisions as determining state law, they are not bound to hold that the rules announced by the state Courts were the law of the state from the beginning. See:

Texarkana v. Arkansas Gas Co., 306 U. S. 188, 201-202;

Getz v. Nevada Irr. Dist., 112 F. (2d) 495, 497.

(2) The federal Courts may hold, contrary to many earlier decisions, that a state Court decision which construes a statute is a law within the meaning of the tenth section of the first Article of the Constitution.

The proposition just stated is, we submit, the very foundation of the rule of the *Erie* case itself. That case rests upon the dissenting opinions of Mr. Justice Holmes, which in turn are grounded squarely upon the proposition that judicial decisions are legislative in nature. See, particularly, his dissenting opinion in:

Kuhn v. Fairmont Coal Co., 215 U. S. 349, 371;

Southern Pacific Co. v. Jensen, 244 U. S. 205, 221.

In the case last cited Mr. Justice Holmes said, "I recognize without hesitation that judges do and must legislate * * *." This view is further fortified by the concurring opinion of Mr. Justice Reed in the *Erie* case (304 U. S. 64, 90 ff.) as well as by the majority opinion itself.

Again, in

Douglass v. County of Pike, 101 U. S. 677, 687, the Court said:

> "The true rule is to give a change of judicial construction in respect to a statute the same effect in its operation on contracts and existing contract rights that would be given to a legislative amendment; that is to say, make it prospective, but not retroactive. After a statute has been settled by judicial construction, the construction becomes, so far as contract rights acquired under it are concerned, as much a part of the statute as the text itself; and a change of decision is to all intents and purposes the same in its effect on contracts as an amendment of the law by means of a legislative enactment." (105 U. S. 60, 72.)

If the Court does not take this view then it is a noteworthy fact that the position will be this: that although an inescapable corollary of the *Tompkins* case is that state Court decisions like the later Montana cases here involved, are, in all essential respects, both in their juridical nature and in their effect, the precise equivalent of statutes which the Constitution forbids the states to enact, and which it is the power and constitutional duty of the federal Courts to condemn, notwithstanding all this, the federal Courts are nevertheless helpless; because decisions are not "laws", or if laws, were not "passed".

(3) The federal Courts might hold (although we submit they should not), that decisions like *Gelpcke v. Dubuque* and the *Judith Basin* case, although not unconstitutional, are wrong.

It is thinkable that the federal Courts might so hold, on the ground that the federal Courts should accept these state decisions as declarations of law *ex post facto;* under the ancient and essentially mystical doctrine that judicial decisions, declare, but cannot make, the law.

In view of the trend of recent decisions (particularly the *Erie* case itself), which repudiate this doctrine, it seems clear that the Court should not take this view. See, also,

Great Northern R. Co. v. Sunburst Oil & Ref. Co., 287 U. S. 358.

(4) The federal Courts might hold that although the rules announced in *Gelpcke v. Dubuque,* and in cases like the *Judith Basin* case, achieve a desirable result, they must nevertheless be overruled, because, under an extension of the reasoning in the *Erie* case, it is unconstitutional for the federal Courts to refuse to follow such state Court decisions. This, we submit, would be unsound.

There is, we submit, no sound ground upon which it could be held that the rules of *Gelpcke v. Dubuque* and the *Judith Basin* case are unconstitutional.

The Constitution does not require the federal Courts to give retroactive effect to state decisions construing statutes.

The unconstitutionality of *Swift v. Tyson,* declared by the majority opinion in the *Erie* case, rests, not on the proposition that federal Courts must follow state Court decisions, but on the very different proposition that the federal Courts are without power to make

law for the states. (304 U. S. 64, 78 ff.) But when a Court proceeds as this Court did in the *Gelpcke* case, or as the Court below did in the *Judith Basin* case, it does not make law for the state. On the contrary it simply recognizes (what the state would freely admit) that in every factual sense, the rule announced in the earlier state Court decision was the law of the state, was the rule governing every person and agency in the state, including the Courts, up to the moment when the overruling case was decided. All this, of course, is not only recognized by, but is the vital ground for, the decision of the *Erie* case.

It simply is not true that under the doctrine of the *Erie* case, the federal Courts are bound, constitutionally or otherwise, to give retroactive effect to state judicial decisions. *A fortiori*, the *Erie* case should not be taken to hold that the Constitution requires giving retroactive effect to state decisions in cases where, as here, the effect of doing so is to violate the spirit if not the letter of the tenth section of Article I of the Constitution, is in every realistic sense to destroy contract rights, and is to abdicate both the power and the duty of the federal Courts to protect non-resident litigants against unfair treatment by the local tribunals.

IV.

IT IS (WE SUBMIT) RES JUDICATA THAT THE BONDS IN SUIT ARE GENERAL OBLIGATIONS.

Petitioners brought this action as trustees. (R. 81, 83, 24.) One of the *cestuis* is Mr. T. C. Elliott. (R. 86.) In the case of

Drake v. Schoregge, 85 Mont. 94, 104,

it was held that the very bonds here sued on are

> "a general indebtedness against the district, in the sense that all lands therein are taxable for the payment thereof with interest, until the entire indebtedness is fully paid. (*Cosman v. Chestnut Valley Irr. Dist.,* 74 Mont. 111, 40 A. L. R. 1344, 238 Pac. 879.)"

Mr. T. C. Elliott intervened in the *Schoregge* case, as did the respondent Toole County Irrigation District. (85 Mont. 94, 95.) As shown above, this decision concerning the nature of Montana irrigation district bonds was later overruled by the Supreme Court of Montana; and the fundamental basis of the decision of the Court below is that the later Montana decisions are controlling under the doctrine of the *Tompkins* case.

We submit that the question is *res judicata* as against the District.

(a) It is unnecessary to plead res judicata in such a case as this.

As explained in the petition, petitioners did not plead *res judicata* because under the laws it then stood, and as it stood for a year thereafter, petitioners' rights against the District could be vindicated without difficulty.

In any event, it is settled that where, as here, a former adjudication is relied on as *res judicata,* not of the very cause of action asserted, but simply as conclusive of a particular issue or question, the former adjudication need not be pleaded:

Southern Pacific R. Co. v. United States, 168 U. S. 1, 25, 59;
2 *Freeman on Judgments* (5th ed.) 1690;
Notes, 88 *A. L. R.* 574, 575;
Notes, 120 *A. L. R.* 8, 67 ff.

Moreover, where, as here, the issue claimed to be *res judicata* is a question of law, it is surely unnecessary, because it would be improper, to plead it.

(b) Such a question may become res judicata.

It is of course true that the doctrine of *res judicata* does not apply to "unmixed questions of law":

United States v. Moser, 266 U. S. 236.

But where, as here, a question has been litigated concerning the legal nature or effect of a particular right, that decision becomes *res judicata:*

Bissell v. Spring Valley Township, 124 U. S. 225, 235;
See 55 *Harv. L. Rev.* 120.

(c) Respondent is bound in this action by the prior adjudication.

The examination of the report in

Drake v. Schoregje, 85 Mont. 94,

indicates that the question, whether the bonds of Toole County Irrigation District are a general obligation, was exhaustively litigated; and both the District and the bondholders were actively represented. Moreover,

as pointed out, both respondent and at least one of the persons beneficially represented by petitioners in the present action, were actually parties in the *Schoregge* case. How much further privity can be established between the petitioners here and the parties in the *Schoregge* case, does not appear in the record.

The idea has been developing in recent years that there is little merit in the old notion that estoppel by judgment must be mutual; and that on the contrary, a litigant who has had his day in Court should be bound by the judgment even as against persons not parties thereto. This because of the strong policy against repeated litigation of the same question. See:

54 *Harv. L. Rev.* 889;
90 *U. of Pa. L. Rev.* 359;
55 *Harv. L. Rev.* 547;
18 *N. Y. U. L. Q. Rev.* 565;
Bernhard v. Bank of America, ... Cal. ....., 19 Adv. Cal. 877, 880, ff.

It was natural and proper, we submit, that petitioners should not invoke the *Schoregge* case as *res judicata,* particularly since under the directly applicable decision in the *Judith Basin* case (9th Cir., 73 F. (2d) 142), petitioners' right to complete relief was settled beyond any question.

If, therefore, the record does not sufficiently disclose the nature and degree of privity existing between petitioners and the parties to the *Schoregge* case, we submit that petitioners should be given an opportunity to develop fully the point of *res judicata.*

V.

PETITIONERS ARE ENTITLED TO A MONEY JUDGMENT IN ANY EVENT.

The complaint herein was simply a complaint for a money judgment. (R. 2, 19.) The judgment of the Court below was an unqualified reversal of the trial Court's judgment for the plaintiffs. (R. 129.)

As the case now stands, therefore, the judgment appears to be that nothing is owing to petitioners, notwithstanding that the answer admitted the execution of the bonds and the fact of non-payment, and notwithstanding the trial Court's findings and judgment, which show that $96,950, with interest from July 1, 1932, is owing and unpaid.

The explanation of this state of the record is as follows: In the first place, the complaint sought a money judgment pursuant to established federal practice.

It appears to be settled that in the federal Courts, the substantive rights of bondholders must first be determined in a suit for a money judgment, mandamus being simply an ancillary remedy. On this ground, the federal Courts may, and indeed must, proceed as the trial Court proceeded, notwithstanding contrary state practice.

County of Greene v. Daniel, 102 U.S. 187, 195.

As was declared in

Divide Creek Irrigation District v. Hollingsworth, 72 F. (2d) 859, 864,

"In the federal courts mandamus is an ancillary remedy, available in such instances as this,

> only after the right has ripened into judgment. An action to adjudicate the existence of the right is a necessary step in the enforcement of that right by mandamus. The courts of the United States are not deprived of the power to enforce the right because it is rooted in a state statute which prescribes a different method of enforcement in the state courts."

The new federal rules abolish the write of mandamus (Rule 81(b)), but do not indicate any change of the rule quoted above. See Moore's *Federal Practice,* p. 3427.

At the trial, respondent objected to the introduction in evidence of the agreed statement on the ground, among others, that

> "the Supreme Court of Montana has heretofore held that the bonds here sued on are not the obligations of the Irrigation District but merely charges against the lands within the District, and the Irrigation District merely acts as an agency in making the assessments and paying of the amounts collected, and the bondholder is not entitled to a money judgment against the irrigation district, and these decisions of the Supreme Court of Montana on a matter of state law are binding on this court, and under these decisions of the State Supreme Court, the Complaint herein does not state facts sufficient to constitute a cause of action." (R. 94-95.)

Thus the question was presented to the trial Court whether or not the bonds are a general obligation, payable by assessment on all the lands in the District until fully paid. Moreover, this fundamental question

was fully covered in the briefs submitted to the trial Court (R. 96); and was dealt with in detail and disposed by the trial Court, both in its opinion (R. 90, 92-93), and in its conclusions of law. (R. 100, 101.) The Court below disagreed with the trial Court's decision on this question, and reversed the judgment without any qualification. (R. 121, ff.)

It is, we submit, apparent that the unqualified reversal of the judgment was erroneous, since it seems to adjudicate that nothing is owing.

Whatever the merits of respondent's position on the question whether the bonds are a general lien, a large sum is admittedly owing, and petitioners are therefore entitled to a money judgment, to be enforced, so far as it can be, in later proceedings.

VI.

THE DISTRICT EXPRESSLY CONTRACTED TO PAY THESE BONDS AS A GENERAL OBLIGATION AT A TIME WHEN THE STATE LAW SO PROVIDED.

As shown in the petition herein, the Supreme Court of Montana held, in 1925, that bonds like these are a general obligation, payable out of assessments levied against all of the lands in the District until the debt is fully paid:

Cosman v. Chestnut Valley Irrigation District, 74 Mont. 111,

and reiterated this construction of the statute in 1929, in a case involving the very bonds here in suit:

Drake v. Schoregge, 85 Mont. 94.

Thereafter, in 1930, after all the bonds had defaulted, the District expressly undertook that it would do what these cases said the statute required it to do in any event, namely that it would

> "hereafter levy and cause to be collected taxes upon all of the taxable land within the District in an amount sufficient to pay the entire principal amount of the bonds now outstanding, together with interest thereon."

This contract emphasizes the fact that as conclusively interpreted, the Montana statutes enacted that these bonds were general obligations, until the overruling decision in

> *State Ex Rel Malott v. Board of County Commissioners of Cascade County,* 89 Mont. 37, 85,

decided years after the bonds here in suit had matured and years after the new promise, made by the District in 1930, to pay those bonds through general assessments on all taxable land within the District.

We know of no state Court decision bearing on the validity or effect of the District's new promise made in 1930.

In any event the District's new promise, made after the decisions holding the bonds to be general obligations, brings the present case squarely within the rule of

> *Gelpcke v. Dubuque,* supra.

CONCLUSION.

We urge that the judgment of the Court below should be reversed, and the judgment of the trial Court affirmed.

Dated, Turlock, California,
April 22, 1942.

Respectfully submitted,
W. COBURN COOK,
Counsel for Petitioners.

CHARLES DAVIDSON,
EVAN HAYNES,
Of Counsel.

Due service and receipt of a copy of the within is hereby admitted

*this*_____*day of April, 1942.*

_____

Counsel for Respondent.